

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATIONS FOR)	
PERMIT TO APPROPRIATE WATER NOS.)	PRELIMINARY ORDER
15-7273, 15-7274, AND 15-7275 IN THE)	
NAME OF M. J. DAVIS MEMORIAL)	
LIMITED PARTNERSHIP)	
_____)	

On December 16, 2005, M.J. Davis Memorial Limited Partnership ("MJ Davis") filed three applications for permit to appropriate water with the Idaho Department of Water Resources ("IDWR"). IDWR determined the applications were not complete, and returned them to MJ Davis. On January 4, 2006, MJ Davis refilled the applications with IDWR.

IDWR assigned water right numbers 15-7273, 15-7274, and 15-7275 to the applications. IDWR published notice of the applications. The applications were protested by Samaria Water and Irrigation Company ("Samaria Irrigation"), Dee's, Inc., the Samaria Recreation and Cemetery Districts, and several residents of the City of Samaria.

On November 14, 2006, IDWR conducted a hearing regarding the protests. Attorneys Randall Budge and Thomas Budge appeared on behalf of MJ Davis. Attorneys Roger Ling and Michael Tribe appeared on behalf of Samaria Irrigation. John Evans appeared as a representative of the Samaria Recreation District. The Samaria Cemetery District and other Samaria residents did not appear at the hearing.

The protests filed by Samaria Recreation District, Samaria Cemetery District, and Samaria residents only included one protest fee. As a result, the Department will consider John Evans, the spokesperson who appeared on behalf of the recreation district, as the spokesperson for the Samaria Cemetery District and other Samaria residents and will not issue a default order to these parties. Dee's, Inc. did not appear, and its non-appearance will be addressed in a separate notice of default.

After reviewing the evidence submitted at the hearing, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application for permit to appropriate water no. 15-7273 proposes the following:

Source:		Rosebud Creek	
Flow rate:		0.25 cfs	
Purpose of Use:		Irrigation	
Priority:		January 4, 2006	
Period of Use:		4/1 to 11/1	
Points of Diversion:			
Township 15 South, Range 35 East		SWNE of Section 22	NWNW of Section 27
Place of Use:			Acres
Township 15 South, Range 35 East	Section 22	NENE	30
		NWNE	40
		SWNE	40
		SENE	22
	Section 27	NWNW	30
Total Acres Irrigated			162

2. Application for permit to appropriate water no. 15-7274 proposes the following:

Source:		Dry Pine Creek	
Flow rate:		0.75 cfs	
Purpose of Use:		Irrigation	
Priority:		January 4, 2006	
Period of Use:		4/1 to 11/1	
Points of Diversion:			
Township 15 South, Range 35 East	SWNE of Section 22	NWNW of Section 27	
Place of Use:			Acres
Township 15 South, Range 35 East	Section 22	NENE	30
		NWNE	40
		SWNE	40
		SENE	22
	Section 27	NWNW	30
Total Acres Irrigated			162

3. Application for permit to appropriate water no. 15-7275 proposes the following:

Source:		Thomas Davis Creek	
Purposes of Use:		Flow rate:	
Irrigation		1.0 cfs	
Stockwater		0.02 cfs	
Recreation		1.0 cfs	
Asthetics		1.0 cfs	
Fire Protection		1.0 cfs	
Total Flow Rate Sought for Appropriation		1.02 cfs	
Priority:		January 4, 2006	
Period of Use:			
Irrigation		4/1 to 11/1	
Stockwater		4/1 to 11/1	
Recreation		1/1 to 12/31	
Asthetics		1/1 to 12/31	
Fire Protection		6/1 to 11/1	
Points of Diversion:			
Township 15 South, Range 35 East		Section 22	SWNE
		Section 27	SWSW, SENW, NENW
		Section 34	NWNW
Irrigation Place of Use:			Acres
	Section 22	NENE	30
		NWNE	40
		SWNE	40
		SENE	22
	Section 27	NWNW	30
		NENW	40
		NWNW	40
		SENE	40
		SWNW	40
		NESE	40
		NWSE	40
		SESE	40
	Section 34	SWSW	40
		NENE	20
		NWNE	15
		NENW	20
		NWNW	20
Total Acres Irrigated			522

Place of Use of Other Proposed Beneficial Uses:

Township 15 South Range 35 East	Section 22	NENE	Stock
		SWNE	Stock
	Section 27	NENW	Stock, Recreation, Aesthetic, Fire
		NWNW	Stock, Recreation, Aesthetic, Fire
		SWNW	Stock, Recreation, Aesthetic, Fire
		NESW	Stock, Recreation, Aesthetic, Fire
		NWSW	Stock, Recreation, Aesthetic, Fire
		SESW	Stock, Recreation, Aesthetic, Fire
	Section 34	NENE	Stock, Recreation, Fire
		NWNE	Stock, Recreation, Fire
		NENW	Stock, Recreation, Fire
		NWNW	Stock, Recreation, Aesthetic, Fire

4. MJ Davis owns 565 acres west of the town site of the City of Samaria. The ownership is comprised of 320 acres of mountainous ground; 75 acres of land procured in a trade with Dee's, Inc.; 132 acres of farm land near the Samaria Cemetery; and 38 acres within the town site of the City of Samaria. MJ Davis owns the real property free and clear of financial encumbrances.

5. Jeff Davis is a general partner in MJ Davis and manages the property. Jeff Davis is an anesthesiologist and has monetary resources to complete the proposed projects.

6. The entire ownership is described in the place of use grid summary on page 2 of application to appropriate water no. 15-7275.

7. Presently only 38 acres of the entire 565 acres are planted to crops requiring irrigation. Approximately 95 acres of land previously cultivated is enrolled in the Conservation Reserve Program ("CRP"). Much of the remainder of the land has not been cultivated.

8. MJ Davis desires to appropriate water to irrigate the irrigable lands owned by the partnership. In addition, MJ Davis desires to irrigate trees and other growth to enhance habitat and riparian areas on the MJ Davis property.

9. Currently, MJ Davis has installed a drip system that delivers water from Thomas Davis Creek to approximately 400 trees on the MJ Davis property.

10. On December 19, 1980, Samaria Irrigation filed three claims to a water right under Idaho Code § 42-243. The claims assert perfection of water rights, through beneficial use, that were unrecorded prior to the filing of the claims. The claims assert the following components of water rights:

Claim No. 15-4066:

Source of water:	Thomas Davis Spring
Flow Rate:	0.90 cfs
Date of Priority:	November 1925

Claim No. 15-4067:

Source of water:	Rose Bud Spring
Flow Rate:	0.20 cfs
Date of Priority:	November 1925

Claim No. 15-4068:

Source of water:	Dry Pine Spring
Flow Rate:	0.90 cfs
Date of Priority:	November 1925

11. The place of use for the claims describes 845 acres purportedly within the Samaria Irrigation service area.

12. In preparation for this hearing, Samaria Irrigation researched the records of Oneida County. In searching the records, Samaria Irrigation found documents titled "Notice of Water Right," filed by James Thomas and others, recorded with Oneida County on July 5, 1893. These notices were purportedly posted at the points of diversion described and assert beneficial use of water beginning on July 3, 1893. The notice of water right from Thomas Davis Canyon generally described an approximate point of diversion and a quantity of 150 miner's inches of water. The notice of water right for "Rose Brush Canyon" generally described an approximate point of diversion and a flow rate of 50 miner's inches of water. The notice of water right for "Dry Pine Canyon" generally described an approximate point of diversion and a flow rate of 100 miner's inches of water.

13. In addition to the notices of water right, Samaria Irrigation also found documents that purport to convey the water rights described in the notices of water right to Samaria Irrigation. All of these documents are contained in Exhibit B.

14. In June 2006, Samaria Irrigation amended claim nos. 15-4066, 15-4067, and 15-4068 pursuant to Idaho Code § 42-244. The amended claims reflected the dates of first beneficial use of water as described in the notices of water right, and also reflected the quantity set forth in the notices as follows:

Claim No. 15-4066 (Thomas Davis Creek):	
Flow Rate:	3.0 cfs
Priority Date:	July 3, 1893

Claim No. 15-4067 (Rose Brush Creek):	
Flow Rate:	1.0 cfs
Priority Date:	July 3, 1893
Claim No. 15-4068 (Dry Pine Creek):	
Flow Rate:	2.0 cfs
Priority Date:	July 3, 1893

15. The place of use described by the amended claims is the same 845 acres described in the original claims.

16. The parties to this contested case agreed that Samaria Irrigation holds beneficial use water rights. The parties to this contested case dispute the quantities of water and the priority dates authorized by the beneficial use water rights.

17. Samaria Irrigation alleged that it has diverted “all of the water flowing in Thomas Davis Creek, Rose Bud Creek, and Dry Pine Creek.” The reference to “all of the water” is probably not accurate, however, because, at times, it is likely there is water in excess of the flows claimed that discharges from the sources. In addition, Samaria Irrigation is limited to a diversion of 0.02 cfs for the acres listed as the place of use. A flow rate of 6.0 cfs of cumulative flow claimed by the three beneficial use claims is within the authorized limit for irrigation of 845 acres.

18. There is sufficient documentary evidence in the files for the hearing officer to determine that 6.0 cfs asserted as the cumulative flow component of the beneficial use water rights must be protected when considering new applications to appropriate water.

19. Although the period of use spans from April 1 through November 1 of each year, the beginning and ending of actual irrigation depends on weather conditions. During a dry year, diversions from the sources of water may begin very close to April 1. In a wet year, diversions may begin as late as June.

20. During the fall, diversions may cease at various times depending on the water supply and the precipitation in the fall.

21. During recent drought years, water flowed in the creek channels of Thomas Davis Creek, Rosebud Creek, and Dry Pine Creek in the mountains during the summer, but ceased flowing as the channels discharged onto the foothill benches for delivery to the arable land. During these periods of time, water was not available from Rosebud Creek, Dry Pine Creek, and Thomas Davis Creek to Samaria Irrigation for diversion and delivery to its patrons in its service area.

22. The proposed points of diversion identified by applications to appropriate water nos. 15-7273 (Rosebud Creek) and 15-7274 (Dry Pine Creek) do not locate the points of diversion on Rosebud Creek or Dry Pine Creek. The proposed points of diversion are located on a delivery canal that is controlled, maintained, and operated by Samaria Irrigation.

23. The recreation and aesthetic uses proposed by application no. 15-7275 are either uses that seek recognition of water flowing in Thomas Davis Creek, or recreation and aesthetics associated with the irrigation sought by the application. No separate recreational or aesthetic uses were identified as being associated with an off-stream diversion of water in addition to the irrigation use.

CONCLUSIONS OF LAW

1. Idaho Code § 42-203A states in pertinent part:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. The applicant bears the ultimate burden of proof regarding all the factors set forth in Idaho Code § 42-203A.

3. Idaho Code § 42-701 states as follows:

(1) The appropriators or users of any public waters of the state of Idaho shall maintain to the satisfaction of the director of the department of water resources suitable headgates and controlling works at the point where the water is diverted. Each device shall be of such construction that it can be locked and kept closed by the watermaster or other officer in charge, and shall also be of such construction as to regulate the flow of water at the diversion point. Each such appropriator shall construct and maintain, when required by the director of the department of water resources, a rating flume or other measuring device at such point as is most practical in such canal, ditch . . . from the stream . . . or other source of public water. Plans for such headgates, rating flumes, or other measuring devices shall be approved by the department of water resources.

4. Applications for permit to appropriate water nos. 15-7273 and 15-7274 propose appropriation of water from a described location at which neither the channel of Rosebud Creek

or Dry Pine Creek is located. Application nos. 14-7273 and 15-7274 locate as proposed points of diversion a Samaria Irrigation delivery canal channel location. IDWR cannot approve a point of diversion from an existing canal. As a result, application nos. 15-7273 and 15-7274 should be denied.

5. At times, there is additional water available for appropriation from Thomas Davis Creek. These times include the early irrigation season when small amounts of water are being diverted for irrigation and the flows may be large, late in the irrigation season when Samaria Irrigation discontinues delivery of water, and times during the summer when the flow of Thomas Davis Creek does not reach the points of diversion for Samaria Irrigation. There is sufficient water for at least the partial irrigation of trees, shrubs, and riparian areas near Thomas Davis Creek as proposed by MJ Davis.

6. The hearing officer is not determining the validity of claims to water right nos. 15-4066, 15-4067 and 15-4068 in this proceeding. However, IDWR must consider the beneficial use claims to water rights if there is sufficient evidence to support the claim of water right asserted. Based on the testimony presented and the evidence of record, the hearing officer determines that it is reasonably likely the claims could be recognized when adjudicated. The hearing officer also determines it is reasonably likely the quantities shown in the amended claims and the proposed priority dates could be recognized. As a result, the quantities of water claimed by Samaria Irrigation should be protected from injury that might occur as a result of a new appropriation of water.

7. During much of the irrigation season MJ Davis may not be entitled to divert any water. On the other hand, Samaria Irrigation must reasonably account for the water being diverted and used for beneficial purposes, and must not divert in excess of the quantity of water claimed.

8. Pursuant to Idaho Code § 42-701, Samaria Irrigation should be required to install a headgate and measuring device acceptable to IDWR at its point of diversion from Thomas Davis Creek. The controlling works are required to insure that water is delivered in accordance with Samaria Irrigation's claimed flow rate of 3.0 cfs. The headgate shall be under the control of Samaria Irrigation. Samaria Irrigation should provide for access by MJ Davis to the measuring device.

9. Anytime the flows of Thomas Davis Creek exceed the flow rate set forth in Samaria Irrigation's amended claim no. 15-4066 at Samaria Irrigation's point of diversion, or at any time Samaria Irrigation is not diverting its full flow rate under amended claim no. 15-4066 and excess water is flowing past Samaria Irrigation's point of diversion, MJ Davis is entitled to divert water from Thomas Davis Creek. This entitlement shall be conditioned upon fulfillment of other requirements discussed below.

10. MJ Davis does not presently have the right to divert water through the irrigation system owned by Samaria Irrigation. Idaho Code 42-1106 grants the authority of eminent domain to water users who want to have an easement in an existing irrigation system. This authority was confirmed by the Idaho Supreme Court in *Canyon View Irrigation Co. v. Twin*

Falls Canal Co., 101 Idaho 604, 619 P2d 122 (1980).

11. To the extent any diversion of water proposed by application no. 15-7275 must be delivered through Samaria Irrigation's water delivery system, MJ Davis must first obtain a right of way or other consent for delivery of water through the Samaria Irrigation system. This right can be obtained by agreement or by eminent domain.

12. The hearing officer will not address the issue of futile call. The testimony established that water is available, at times, in the upper reaches of Thomas Davis Creek and would not reach the headgates of Samaria Irrigation. Nonetheless, the determination of a futile call is fact dependent. Futile call is determined during the administration of water rights not at the time of determining whether there is water available for appropriation.

13. There is not yet a water district created for administration of water from Thomas Davis Creek. As a result, a watermaster cannot regulate water based on principles of futile call. In this approval, the availability of water will be determined based on the actual surface water flow that is available or not available at the points of diversion. If Samaria Irrigation District cannot divert water at its point of diversion, then MJ Davis can divert the water, to the extent it can be beneficially used.

14. MJ Davis has sufficient financial resources to complete the project.

15. The applications are not filed for the purposes of speculation, delay, or in bad faith.

16. The applications are in the local public interest, provided that the rights of Samaria Irrigation and the delivery of water to its patrons is protected.

17. The use of drip irrigation systems and the careful management of water will conserve the water resources of the state of Idaho.

ORDER

IT IS HEREBY ORDERED that applications for permit to appropriate water nos. 15-7273 and 15-7274 are **Denied**.

IT IS FURTHER ORDERED that application for permit to appropriate water no. 15-7275 is **Approved**, but the beneficial uses under permit no. 15-7275 are limited to irrigation and fire protection.

IT IS FURTHER ORDERED that application for permit to appropriate water no. 15-7275 is subject to the following conditions:

Proof of application of water to beneficial use shall be submitted on or before **May 01, 2012**.

Subject to all prior water rights.

Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.

Water shall not be diverted for fire protection use under this right except to fight or repel an existing fire.

This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.5 afa per acre at the field headgate for irrigation of the lands above.

After specific notification by the Department, the right holder shall install suitable measuring devices on all authorized points of diversion, record the quantity of water diverted, and annually report diversions of water and/or other pertinent hydrologic and system information as required by Section 42-701, Idaho Code.

The water right holder may only divert water from Thomas Davis Creek when: (a) the flow of Thomas Davis Creek exceeds the flow rate claimed in Samaria Irrigation amended claim no. 15-4066 at Samaria Water and Irrigation Company's point of diversion; or (b) at any time Samaria Water and Irrigation Company is not diverting its full flow rate under amended claim no. 15-4066 and excess water is flowing past Samaria Water and Irrigation Company's point of diversion; or (c) at any time Samaria Water and Irrigation Company cannot divert water at its point of diversion and the water right holder can divert and beneficially use the water in Thomas Davis Creek.

IT IS FURTHER ORDERED that Samaria Water and Irrigation Company shall install and maintain a controlling works and measuring device, acceptable to IDWR, for its point of diversion located on Thomas Davis Creek. The measuring device shall be installed within ten (10) days following the date this decision becomes final.


IT IS FURTHER ORDERED that Samaria Irrigation shall either (a) allow the water right holder access to the read the measuring device; or (b) upon written request from the water right holder, daily report to the water right holder the flow rate being diverted from Thomas Davis Creek.

IT IS FURTHER ORDERED that, if Samaria Water and Irrigation Company: (a) refuses to install the measuring device; or (b) refuses to allow the right holder access to its measuring device and also fails or refuses to daily report to the right holder after the right holder has requested daily reporting of the diversion from Thomas Davis Creek, the right holder may divert water from Thomas Davis Creek under right no. 15-7275 until Samaria Water and Irrigation Company allows access or daily reports its diversion rate from Thomas Davis Creek to the right holder.

II IS FURTHER ORDERED that the following additional condition shall be added to permit no. 15-7275 to authorize diversion when the Samaria Water and Irrigation Company refuses or fails to allow access or report its diversions as described in this order:

Samaria Water and Irrigation Company is required by order to install and maintain a measuring device at its point of diversion from Thomas Davis Creek, allow the right holder access to the measuring device, or after refusing access, and upon written request from the right holder, daily report its diverted flow rate to the right holder. If Samaria Water and Irrigation Company: (a) refuses to install the measuring device; or (b) refuses to allow the right holder access to its measuring device and also fails or refuses to daily report to the right holder after the right holder has requested daily reporting of the diversion from Thomas Davis Creek, the right holder may divert water from Thomas Davis Creek under 15-7275 until Samaria Water and Irrigation Company installs the measuring device and allows access or daily reports its diversion rate from Thomas Davis Creek to the right holder as described above.

DATED this 2nd day of May, 2007.


GARY SPACKMAN
Hearing Officer